



Interview with Emily Crawford

Author of *Non-Binding Norms in International Humanitarian Law* (2021)*

Emily Crawford is an Associate Professor at the University of Sydney Law School, where she teaches and researches in international law, international humanitarian law and international criminal law. She has published widely in the field of international humanitarian law, including three monographs (The Treatment of Combatants and Insurgents under the Law of Armed Conflict (Oxford University Press, 2010), Identifying the Enemy: Civilian Participation in Hostilities (Oxford University Press, 2015) and Non-Binding Norms in International Humanitarian Law (Oxford University Press, 2021)), and a textbook (International Humanitarian Law (with Alison Pert, 2nd edition, Cambridge University Press, 2020)). She is an associate of the Sydney Centre for International Law, and a co-editor of the Journal of International Humanitarian Studies.

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Setting the scene: Understanding non-binding norms in international humanitarian law (IHL)

1. War has existed for far longer than efforts to regulate it. But the past 150+ years have seen meaningful and binding regulations at the multilateral, intra-State level, seeking to render war less cruel, for example by protecting those who are

* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the *International Review of the Red Cross*.

not, or no longer, taking a direct part in hostilities. How do you see the role of non-binding norms in the regulation of armed conflicts?

Non-binding norms have a vital role to play in IHL because they offer the opportunity for all stakeholders – not just States – to actively engage in norm generation and norm implementation. Non-binding instruments also potentially have the scope to respond to new events and new developments in practice in a timelier manner than necessary for treaty-making or customary norm generation – a group of interested academics or practitioners or a small group of States can convene meetings over the course of a few years and produce a draft instrument, arguably more quickly than if such an instrument needed to go through, say, the International Law Commission (ILC) and then an international conference – we saw this with the Tallinn Manuals¹ and the International Committee of the Red Cross (ICRC) Direct Participation in Hostilities (DPH) Guidance.² An additional advantage is that once the document is released, it is effectively “done” – it does not have to be sent to an international conference for debate and potential amendment, dilution and/or reservation, and there is no need to wait for that treaty, as adopted, to finally come into force. So, there is a significant advantage in terms of responsiveness, timeliness and the unity of the instrument.

This is not to say that all non-binding instruments can be created so quickly or easily. Some non-binding instruments can take decades to come to fruition – like the ILC Articles on State Responsibility,³ for example. However, even the drafts of such non-binding instruments have value – each iteration can serve as something like an “early-warning system” if you will – alerting stakeholders at large that there is an area requiring further debate, whether that debate takes place in an expert group or in a forum like a United Nations committee or expert body. So, in the IHL realm, the ILC work on the protection of the environment in armed conflict, which was started in 2013, has, for the last ten years, really helped focus and crystallize debate and analysis on the question of how the natural environment is impacted by armed conflict and what should be done to remedy such impacts.

2. Article 38 of the Statute of the International Court of Justice (ICJ) is often presented as listing the sources of international law, or at least of what can be invoked as such in front of the Court. The two most prominent sources are, of course, treaty and customary international law. How do non-binding norms fit into this understanding of the sources of international law?

1 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, 2013 (Tallinn 1.0); Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, New York, 2017 (Tallinn 2.0).

2 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

3 James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002.

The debate over whether Article 38 of the Statute of the ICJ⁴ is the final word on the sources of law is, I would wager, as old as the ICJ Statute itself. Open any textbook of international law and you will find Article 38 of the ICJ statute repeated as the “traditional” sources of international law – I am guilty of this myself! I think that, as lawyers, we like certainty and having a list of sources laid out for us to follow is almost reassuring. A black-letter positivist approach to international law would say that non-binding norms, by their very nature (and definition!), cannot be a source of law – that law, in order to be law, must have binding force – that, for instance, there must be compulsory enforcement mechanisms in place to address violations of the rules. However, scholars of international law know that these very rigid ideas of what makes law *law* do not easily fit the international law system and are actually reductive and unhelpful.

In any event, even if one does believe that law must be binding to be so-called, that does not actually reflect reality – as we have seen in practice in forums like the General Assembly, and in the work undertaken by the ILC, non-binding instruments can be hugely influential in shaping and guiding State and non-State behaviour – even to the point of become customary international law themselves (such as the Universal Declaration on Human Rights⁵). I think that it is possible (and worthwhile) to take a more nuanced approach to the sources of obligation under international law, rather than hewing to such a strict doctrinal approach. I do not want to veer too much into complex questions of the philosophy and theory of international law – that is an arena best left to experts in the field of which I am decidedly not! But I think that there is some value in treating such instruments as having some normative pull – that these documents are treated by their addressees as having *some* element of obligatory force. So, for example, non-State armed groups (NSAGs) who sign Geneva Call’s Deed of Commitment on anti-personnel landmines⁶ pledge to no longer use such weapons, and then actually engage in demining and destruction of stockpiles of anti-personnel landmines. This looks a lot like compliance with a legal norm even in the absence of a legal compulsion to comply.

3. What necessitated or led to the proliferation of non-binding norms in international law in general and IHL in particular, in the past few decades? Can you give us a few examples of such norms in IHL, not only from recent years but older as well?

Non-binding norms have actually always been part of the IHL landscape – you could make the case that *A Memory of Solferino*⁷ was the first non-binding

4 Statute of the International Court of Justice, Art. 38, available at: www.icj-cij.org/en/statute (all internet references were accessed in September 2022).

5 United Nations General Assembly, Universal Declaration of Human Rights, Paris, 10 December 1948, available at: www.un.org/en/about-us/universal-declaration-of-human-rights.

6 Geneva Call, Deed of Commitment Under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, available at: www.genevacall.org/wp-content/uploads/2020/09/DoC-Banning-anti-personnel-mines.pdf.

7 Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1939, 1959, available at: www.icrc.org/en/doc/assets/files/publications/icrc-002-0361.pdf.

document in IHL – a single short booklet by an interested private citizen was so compelling and persuasive that a group of like-minded private citizens and legal experts coalesced to advocate for the adoption of an international treaty to put into effect the elements called for in the book. In 1862, Dunant called for the creation of a neutral organization to care for the wounded armed forces in the field, and for the recognition of the neutrality of medical personnel – by 1864, the Geneva Convention⁸ was adopted to do just that. Quite the achievement.

Since then, States and non-State actors repeatedly engaged in non-binding norm generation – for example, the 1874 Brussels Declaration⁹ (though that was unintentional – the hope had been to adopt a binding instrument), the 1880 Oxford Manual on the Law of Armed Conflict,¹⁰ and the 1923 Hague Rules on Air Warfare.¹¹ However, the recent proliferation of instruments was really “kicked off” with the creation of the San Remo Manual on Naval Warfare in 1994.¹² In the years following the San Remo Manual, you start to see other manuals and documents emerge which cite the San Remo Manual as being a source of inspiration for their own instrument. Whether this is because of the success of the Manual in practice, or because of the ease of the expert process, is not stated, though.

From my research, the overarching motivation behind the creation of the “modern” non-binding instruments has been responding to the paucity of topic-specific instruments and rules at the specific time of the instrument’s creation. This usually takes one of two paths. Some non-binding instruments have been created in response to an existing or recent armed conflict where the law has been unclear or lacking – for example, the lack of treaty development of the law of naval warfare, and the events of the 1982 Falklands War had prompted academics and other practitioners to query whether new law was needed, which eventually led to the San Remo process. Likewise, the widespread use of private military and security contractors in Iraq and Afghanistan in the conflicts of 2002 onwards prompted the process that led to the adoption of the Montreux Document on Private Military and Security Companies in 2008.¹³ However, other non-binding instruments have been more forward-looking – examining emergent trends in weaponeering, for example.

8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864 (entered into force 22 August 1864).

9 Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874 (entered into force 27 August 1874).

10 The Laws of War on Land. Oxford, 9 September 1880 (entered into force 9 September 1880).

11 The Hague Rules of Air Warfare. The Hague, December 1922–February 1923, available at: http://lawofwar.org/hague_rules_of_air_warfare.htm.

12 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994 (entered into force 12 June 1994) (San Remo Manual).

13 The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008, ICRC, Geneva, 2009.

Actors involved in the creation of non-binding norms

4. What is the role of non-governmental organizations (NGOs), international organizations, special rapporteurs or sui generis organizations (e.g. ICRC) in the development or legitimization of non-binding norms? How about the role of academic scholars? Is there a shift away from their role as guardians, protectors or promoters to international law-makers?

Non-State actors have really taken the driving role in the development and legitimization of non-binding instruments – nearly every major non-binding norm of the last thirty years has eventuated either at the initiative of or from the advocacy of a non-State actor – whether that be a group of experts, the ICRC, or some other civil society organization. I see this as civil society taking on the norm-generation role in *addition* to guardian and promoter. By finally “being in the room” where the rules are made (even the non-binding rules!) and having a role in shaping how the rules are explicated, civil society organizations and actors (like academics and non-State practitioners) who have made IHL their life are able to shape the debate, to ensure that the rules are not just about what is convenient for States.

The inclusion of non-State actors in this norm-generation process has led some commentators to reflect on whether this means IHL is moving from *lex lata* to *lex ferenda*. I do not see it as trading one form of law for another – international law treaties on the law of armed conflict are still being adopted after all (such as the nuclear weapons ban treaty¹⁴). Rather, I think the greater embrace of *lex ferenda*, alongside the well-established treaties of IHL, is a better reflection of the innate complexities of trying to regulate a situation that seems inherently resistant to regulation – massive organized armed violence. Nuance is often needed, and that is sometimes absent in black-letter law.

5. Has the proliferation of non-binding norms in IHL been helpful to strengthen inclusion of other non-State actors such as NSAGs, and business organizations as “participants in the practice and development of legal normative standards”¹⁵ as opposed to mere objects in the international legal process? How has this impacted the enforcement of IHL?

Absolutely – and this inclusion of other participants has, I believe, been for the better. Research (not just mine!) has shown that the more non-State stakeholders are engaged in the process of international norm-generation, the more likely it is that those norms are going to be respected by non-State parties (specifically in armed conflicts), which can have a flow-on effect to inducing State parties in armed conflicts to likewise comply with international norms. For example, the

14 Treaty on the Prohibition of Nuclear Weapons, New York, 7 July 2017 (entered into force 22 January 2021).

15 Emily Crawford, *Non-Binding Norms in International Humanitarian Law: Efficacy, Legitimacy, and Legality*, Oxford Academic, Oxford, 2021; online edition 20 January 2022, pp. 150, 158 and 173.

NGO Geneva Call has long engaged with armed non-State groups, in an effort to get such groups to commit to humanitarian norms such as non-use of anti-personnel mines. These commitments are publicly made through Geneva Call's "Deeds of Commitment" – documents that are essentially treaties for non-State actors, in which the NSAG publicly commits to abide by the terms of the Deed. There is compelling evidence to suggest that the signing of the anti-personnel landmine Deed of Commitment by the Sudan People's Liberation Movement/Army (SPLM/A) in October 2001 was pivotal in prompting Sudan to sign and ratify the Ottawa Convention¹⁶ in 2003.

In terms of improving enforcement, that remains a weak spot in some respects – most of the non-binding instruments do not have mechanisms for enforcing their terms, beyond just reporting obligations. However, I do not think this is a weakness just shared by the non-binding instruments – commentators in IHL have, for decades, noted that the weakness in IHL is not its rules, but that there are gaps in the implementation and enforcement of the rules. However, I think this is something endemic to international law generally, rather than non-binding IHL instruments *per se*.

6. What factors contribute to the success and immediate impact/use of non-binding norms? Does the status of the drafters of the non-binding instruments play a role in its acceptance and legitimacy (e.g. States, expert groups, NGOs, civil society, international organizations)? What role does representativeness and diversity (geographic, cognitive, etc.) play in the legitimacy and acceptance of non-binding norms?

The main factor that seemed to influence how quickly and/or completely an instrument began to have an impact was who was involved in its creation – this seemed to be the case even with instruments that at the time seemed a progressive development of the law, rather than a simple restatement. The ICRC, obviously, carries considerable imprimatur in the field, so it was not surprising that instruments that originated from the ICRC (even ones that were considered controversial for various reasons, like the DPH Guidance and the Customary IHL Study¹⁷) were fairly rapidly embraced by practitioners and State processes (such as courts), even if official State receptions were guarded. Likewise, any non-binding instrument that was either created by States (like the Montreux Document) or had considerable buy-in or consultation with States (like the San Remo Manual) were also (comparatively) rapidly embraced in practice.

Documents that came solely from small expert groups, especially where such expert groups were heavily drawn from Western European and Other Group (WEOG) nations, were less likely to have immediate impact. My research showed

16 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (entered into force 1 March 1999) ("Ottawa Treaty").

17 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

that a lack of diversity and representativeness amongst participants seemed to be a consistent marker in whether an instrument gained traction. For example, the San Remo Manual – which was the work of just a few experts – has not been taken up much in State practice; likewise, instruments like Tallinn 1.0 and the Air and Missile Warfare Manual¹⁸ had a notable lack of geographical diversity in their experts, and neither document seemed to make the kinds of inroads into State practice as one would have expected of the only instruments on their subject matter. What is notable is that in Tallinn 2.0, there is more of an effort made to increase the representativeness and diversity of the contributing experts, and there seems to be a concomitant increase in how Tallinn 2.0 is being treated by States, in comparison to 1.0.

This phenomenon is not unique to non-binding instruments obviously – debates regarding representation and diversity in international law-making have been a staple of the literature for decades, but it is worth noting that if non-binding instruments are conceived as a mechanism for norm-generation outside the confines of traditional international law, then perhaps they should not fall into the same patterns and repeat the same shortcomings of traditional international law-making.

Pros and cons of non-binding norms in IHL

7. Non-binding norms are, by intent and definition, non-binding in form and effect. However, recently States are endorsing and announcing their intention to “sign” or “endorse” these instruments, e.g. in the 2022 Explosive Weapons in Populated Areas Declaration¹⁹ and the Safe Schools Declaration.²⁰ How can we make sense of that? What is the importance of a flexible (or rigid) “agreed language” in non-binding norms, as opposed to in binding treaties?

It would be easy to dismiss such acts as performative but ultimately hollow State acts – after all, it looks like States are trying to “have it both ways” – to have a specific and tailored instrument that they can publicly laud and sign and espouse while making absolutely sure there is no way they can be held to account for failing to comply with those self-same lauded behaviours. However, it is easy to be cynical about international law and such cynicism does not help address the real problems that we are all committed to addressing. Also, it is possible that aspirational acts can galvanize behaviour within States and without to put effective mechanisms in place to regulate behaviour. Henry Dunant’s writing after Solferino was essentially an aspirational act, from which the entire protective

18 *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013.

19 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas, Geneva, 17 June 2022, available at: www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/EWIPA-Political-Declaration-Final-Rev-25052022.pdf.

20 Safe Schools Declaration, Oslo, Norway, May 2015.

regime of the ICRC and the Movement has sprung – a regime which has, since 1863, helped countless people in situations of war and public crisis. So, I do not think aspirational acts are inherently problematic.

In terms of the importance of the language of non-binding norms – I think the freedom inherent in the format allows for flexibility or rigidity as it suits the situation, but I do think some definitiveness of language is an option that more non-binding instruments should embrace. In this respect, I am prompted to think of Professor (as he was then) James Crawford’s comments regarding the ILC articles on State responsibility, and whether they should be adopted as a binding treaty – he often remarked that to do so would be to open the articles to the necessary dilutions and reservations that would come in any process leading to binding treaty adoption, and that the articles were far more effective in their original form. Non-binding instruments and their creators should not be too concerned about always hewing to *lex lata* – some *lex ferenda* has its place.

8. What are the advantages and/or disadvantages of non-binding norms? Do non-binding norms erode the system developed as IHL? Do they risk pushing us back into a state of legal uncertainty, or even void, or do they add value to that system? Does the flexibility and interpretive scope of non-binding norms aid in ensuring respect of the minimum, fundamental standards stipulated to protect those affected by armed conflicts?

The obvious disadvantage of non-binding norms is that they are, obviously, not binding, and so no legal consequence follows from ignoring their existence. However, I do not consider this to be a fatal flaw, simply because most of the existing non-binding instruments are not new law at all, but merely statements of how existing IHL, in treaty and custom, applies to new situations such as cyber-warfare, or war in outer space. I do not believe that non-binding norms erode existing hard law systems – as I note in my book,²¹ States have long created and used non-binding instruments in several areas, including human rights, international environmental law and international economic law. There are 150 years of practice that show that non-binding documents can change the behaviour of States and non-State actors, can become customary law, and even spur the adoption of binding obligations in treaty form. So, I do not believe the embrace of the non-binding instrument is some kind of death knell for legal certainty. I believe non-binding documents can offer a dynamism, and flexibility, and responsiveness to emerging situations that allow for a rapidity of response that more traditional avenues of norm-generation lack – and my research shows that many of the “modern” non-binding instruments (post-San Remo) are being treated as legal or near-legal instruments by State organs such as courts.

21 E. Crawford, above note 15.

9. Does the increasing turn to non-binding norms that do not impose hard, enforceable obligations challenge the principles of individual or State accountability for violations of IHL?

As I mentioned earlier, enforcement and accountability in IHL has always been an issue, so the proliferation of non-binding norms does not necessarily add anything meaningful to the problem of enforcement in practice. However, there is a real risk that States will effectively abdicate their primary role as law-makers in international law because they can see that it is being done by other actors in the field, and with the additional benefit of the instruments resulting from that norm-generating having no consequence for their breach. However, I have always felt that the binding provisions of IHL – ones that do carry individual and State accountability – are sufficiently robust that they can be applied in nearly all new situations, even those where there may be a lack of specific treaty law on that same topic. So, any concerns about the legality of artificial intelligence, or fully autonomous weapons, or bio-medical enhancements and nano-weapons, can always be answered with, as a starting point, the principles of distinction, proportionality, military necessity, humanity, and prohibitions on causing unnecessary suffering and superfluous injury. The seventy-plus-year-old Geneva Conventions and the forty-five-year-old Additional Protocols may not mention thermobaric weapons or dense inert metal explosives, but they still apply, and provide a strong, actionable source of obligation that I think can easily exist alongside non-binding instruments of specificity.

Non-binding norms play an important supplementary and supporting role for existing binding norms. That is their *raison d'être* – to assist in the process of applying the existing law to a novel situation. For example, a commander, having to make a targeting decision about a civilian who may or may not be taking direct part in hostilities could look to the ICRC DPH Guidance for an idea of how to approach such a situation. As we know, the Additional Protocols clearly set out that civilians are not to be targeted unless DPH, and the Protocols do not define DPH – so the non-binding DPH Guidance assists in the applying of the binding rule of distinction. So, I do not believe that the turn to non-binding instruments undermines principles of individual or State accountability under IHL – on the contrary, I think they are an important mechanism that assists in ensuring compliance.

In conclusion

10. How do you see the future of non-binding norms in IHL? Do you have any final reflections for our readers?

As I mentioned earlier, non-binding instruments have been part of IHL since the first moves towards codification in the 1800s, so I think it is safe to say that they will remain part of IHL moving forward. However, I say this at a time when

some notable IHL non-binding norms have either been delayed or the processes surrounding them have reportedly hit an impasse – for example, it was intended for the Woomera Manual on the International Law of Military Space Operations²² to be published sometime in 2020–21 but this was of course delayed by the COVID pandemic. There has also been some commentary that the 2nd edition of the San Remo Manual, announced in 2020, has stalled, potentially indefinitely – though I have not been able to find confirmation of this, so we might be able to chalk that up to the academic rumour mill!

This is a crucial time of reflection in international law-making in IHL, where all interested parties can think about what we want and need the law to do, and draw on existing forums (such as the United Nations or ILC) as venues for their elaboration – whether in binding or non-binding form. We should think deeply about what works in the processes of enumerating IHL rules – whether binding or non-binding – and trust that this vital field of law, which has existed for 150 years, will continue to be a bulwark against brutality going forward, so long as we remain committed to the process of renewal and development.

22 See University of Adelaide, The Woomera Manual on the International Law of Military Space Activities and Operations, available at: <https://law.adelaide.edu.au/woomera/>.